United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2644-45

United States Court of Appeals

For the Second Circuit

DOCKET NO. 74-2644

In the Matter of the Petition for
Limitation of Liability

of

MARINE SULPHUR TRANSPORT CORPORATION,
As Owner,

and

MARINE TRANSPORT LINES, INC.,
As Demise Charterer,

of the Vessel MARINE SULPHUR QUEEN,
Petitioners-Appellees and Appellants,

HALGA WATSON, as widow and Executrix of the Estate of
George Watson, deceased,
Claimant-Appellant and Appellee.

DOCKET NO. 74-2645

HALGA WATSON, as widow and Executrix of the Estate of
George Watson, deceased,
Plaintiff-Appellant and Appellee,

against

MARINE SULPHUR TRANSPORT CORP. and
MARINE TRANSPORT LINES, INC.,
Defendants-Appellees and Appellants.

ON CROSS APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES-CROSS-APPELLANTS

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BRIEF FOR APPELLEES-CROSS-APPELLANTS

Issue on Watson Appeal

Were the Findings of the Trial Court Complained of by the Claimant, Halga Watson, Clearly Erroneous?

Issue on Petitioners' Cross Appeal

Were the Findings of the Trial Court Complained of by the Petitioners Clearly Erroneous?

STATEMENT OF RELEVANT FACTS

Some relevant facts not stated in the brief of the Claimant, Halga Watson, are noted below.

For example, there is no mention in her brief about the facts in the record showing the dropping off of activities in the shipping business and the reduced sailing opportunities (Plaintiff's Ex. 31) which, with respect to vessels used by the Petitioners in the carriage of molten sulphur had resulted in Union agreements whereby Masters and Mates had to be off their vessels for extended paid vacation periods (J.A. 193a).

Similarly, no mention is made of the further reduction in sailing opportunities arising out of strikes or periods of depression recognized by a witness for the Claimant as being matters with definite downward impact on the shipping industry (J.A. 126a, 137a, 138a).

Rather curiously, while the Claimant does recognize the certainty of death, no such certainty is conceded with respect to the other element mentioned along with death ~~and~~ in the old aphorism, namely, taxes, and no consideration is given to the possibility that even the certainty of death might happen sooner than the completion of years of full work expectancy and retirement.

In connection with the marriage between the Claimant and the decedent, which took place in February, 1954 and was concededly in existence at the time of his death nine years later when the MARINE SULPHUR QUEEN sank, it is pertinent to note that the marriage was not the first one for either party to it. The decedent had been married several times before and divorced (Claimant's Answer to Interrogatory No. 8), and the Claimant herself was not only married before she married the decedent but in fact was only divorced from her first husband of 21 years on February 18, 1954, the very day on which she married the decedent (Claimant's Answer to Interrogatory No. 7). It should also be noted that the statement made in the Claimant's brief that all of the property of the decedent and herself was held jointly (Br. pp. 8-9) is not accurate in that the greatest amount of the property was in fact in the sole name of the decedent albeit with a claim by the Claimant to a share by virtue of the property being

stated to be community property (J.A. 160a).

With particular reference to the indication given at page 7 in the Claimant's brief to the effect that the appellant spent nine months of the year on board the MARINE SULPHUR QUEEN, with the other three months being paid vacation, it should be noted that, by 1972, the time that the decedent would have spent on board would have been down to about seven months a year on the assumption made by the Claimant and adopted by the Trial Court that the decedent would by then have been sailing regularly as Master rather than as Chief Mate (J.A. 193a). The increased time ashore, almost five months, would necessarily mean that there would be that much more time attributable to the element of consumption on the part of the decedent.

Beyond making the foregoing comments as to additional facts relevant here, it would not seem to be necessary to extend the discussion by considering various statements made in the Claimant's brief under the heading of "Relevant Facts" that are not that but are rather argument on what items should have been or should not have been taken into account by the Trial Court in the computation of damages. Those arguments have to do particularly with the law applicable to the particular claims of error made by the Claimant and they will be considered in the analysis that follows of the applicable law.

Summary of Argument

I

The Claimant, Halga Watson, has failed to show that the findings of the Trial Court complained of by her were clearly erroneous.

II

The Trial Court's findings complained of by Petitioners were clearly erroneous.

I

THE CLAIMANT, HALGA WATSON, HAS FAILED TO SHOW THAT THE FINDINGS OF THE TRIAL COURT COMPLAINED OF BY HER WERE CLEARLY ERRONEOUS

The "clearly erroneous" standard is set forth in Rule 52(a) of the Federal Rules of Civil Procedure and is applicable in both civil and maritime actions. McAllister v. United States, 348 U.S. 19 (1954); Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F. 2d 774 (2d Cir. 1966) cert. denied 385 U.S. 835 (1966); Cleary v. United States Lines Co., 411 F. 2d 1009 (2d Cir. 1969); Montgomery v. Goodyear Aircraft Corporation, 392 F. 2d 777 (2d Cir. 1968) cert. denied 393 U.S. 841 (1968).

The criterion is not simply whether a reviewing Court would have found otherwise but whether the Trial Court could permissibly find as it did. Wright, Federal Courts,

§96, at p. 432, stating that a reviewing Court should upset a finding only when it "* * * is convinced on the whole record that the Finding did not reflect the truth and right of the case." The Supreme Court of the United States has pointed out that, under the "clearly erroneous" provision of Rule 52(a), a reviewing Court has to find a clear mistake before upsetting a finding. McAllister v. United States, supra, at p. 20 of. 348 U.S.

The Claimant complains of the Trial Court's findings that (a) the rate of consumption attributable to the husband in this case involving a mature man and wife without children or dependents was 50%, (b) the portion of the death benefit received by the Claimant that exceeded the smaller death benefit that would have been payable if the decedent had in fact died after retirement had to be deducted in the calculation of the monetary loss, (c) income taxes had to be deducted in the years when the decedent's gross income exceeded $28,000.00, (d) no allowance should be made for lost medical benefits in the absence of proof of what was lost and (e) no factor for inflation should be added in arriving at the amounts that the decedent supposedly would have earned during the projected retirement years.

These assertions will be considered in order below.

The Deduction of 50% for the Decedent's Consumption

At pages 23 to 29 of the Claimant's brief, she quotes *in extenso* from an October 20, 1972 Report of Special Masters in the *Cambria* case. Curiously, the extended quotation leaves one with the impression that the Masters refused to use any mere formula approach. Actually, had the quotation continued on another page, the following language would have been found at page 59 of the Report:

* * * * * * * * *

> "Since we have been unable to differentiate with sufficient accuracy the exact personal expenditures of each of the men, we have determined that a general formula is the fairest estimate for all of the claimants. It appears that personal consumption generally represented a consistent percentage of total earnings. We have, therefore, adopted a blanket formula for determining the decedent's personal consumption, which we have applied in all claims where this is an issue. We have determined that for a family of two, the personal consumption of the husband constitutes 30% of his total earnings. Where there are children, the portion of total earnings which is allocated to the husband's personal expenditures diminishes, depending upon the number of children in the family. Obviously, where there are more people living at home, the decedent's total earnings must be divided among more people, thereby reducing the personal consumption of each family member. Where there is one child we have determined that the husband's consumption is 26 per cent. Where there are two children, 22 per cent; three children, 20 per cent; four children, 18 per cent; and five children, 16 per cent."

It might be noted that no adversary proceeding was involved in the input of information relating to damages or in the calculation of the damages. The Masters had occasion to comment at pages 5-6 in their report on the absence of cross-examination of the witnesses testifying on the subject of damages. As the Masters put it, they dealt "* * * with a situation in which each witness submitted only to direct examination and in which there was no cross-examination to correct inaccuracies or mistakes in the testimony."

Of greater significance than the report of the Cambria Special Masters is a decision rendered the following year by the Court of Appeals for the Sixth Circuit using a 50% factor for a decedent's personal consumption in the case of a decedent being survived solely by a widow. Petition of the United States Steel Corporation, 479 F. 2d 489, 505-7 (6th Cir. 1973).

In passing, we note that the Claimant argues, without any basis in the record, that the Trial Court in our case used the 50% consumption factor previously used by Judge Weinfeld as though it was "a rule of law". Several pages are devoted by the appellant to a discussion of this "rule of law" red herring. The footnote that is found on page 21, at the end of that particular exercise, is particularly interesting for several reasons.

The attorneys representing the appellant here, Messrs. Schwartz & O'Connell, were the attorneys who represented the Fanning Claimants mentioned in that footnote and they made a post-decision motion seeking to obtain an increased award for the Fanning claimants that is certainly relevant in view of the injection of the footnote. That motion was denied by Judge Cannella on December 17, 1974 in an endorsed decision saying, among other things,

* * * * *

> "In Points (b) and (c) of the present motion which concern the children Beda Fanning and Mark Fanning, movant requests that the sums of $75,000.00 and $40,000.00 be entered as proper damages for nurture and care in lieu of those contained in the July 31, 1974 decision. In the opinion of this Court, the sums advanced by movant are simply numbers which are unsupported in the record. Ignored is the fact that the Court is mandated to compensate the dependents for pecuniary loss, not for their real or fancied trials or tribulations. There is nothing in the record to support these figures advanced on behalf of the children, and the relief prayed for is, for that reason, denied.
>
> "The request that the general award of damages granted on this claim be increased is similarly unpersuasive. In his brief (at 33) as he had done previously, counsel for movant argues that only 10% of Fanning's total income should have been deducted for his personal consumption. If such argument is read together with the pertinent testimony, counsel in effect argues that to 1972 the decedent would have existed in a vacuum for 13 weeks of the year, plus every second week-end, and that after 1972 the same would be true for 23 weeks of every year, plus every second week-end. Counsel would have the Court believe that from three to

> almost six months of the year, while at home and on vacation, Fanning would subsist without a cent of personal consumption, to say nothing of his pro rata share of the expenses of the home, the automobile and so forth. Indeed, the proof advanced by the claimant is in fact so nebulous, that the Court is convinced that no alternative, other than the so-called "Weinfeld Formula", is available to it in order to reach a practical and just result."

* * * * * * *

With particular reference to the discussion by Judge Cannella of the consumption factor as treated by the attorneys for the Fanning claimants, it is to be noted that the same approach was taken by those attorneys on the subject of the consumption factor of the decedent (Trial Memorandum, pp. 35 and 38, and Post Trial Memorandum, pp. 43-4), thus giving point to what the Trial Court found was a need to adopt the Weinfeld formula in this case in the absence of any thing more helpful to the Court.

The "detailed evidence" referred to by the Claimant at page 2 of her brief as having been submitted on the consumption issue was nothing more or less than monthly tabulations of expenditures without any significant differentiation to indicate what individual expenditures might be said to be for Mr. Watson as contrasted with expenditures for Mrs. Watson. The Masters dealing with the Cambria fund pointed out that "Most families do not make a computation of the individual expenditures of each family

member." (Report, p. 53). They went on to say that this is what gives rise to difficulty in ascertaining the pecuniary loss actually suffered by each family member. At that same page of their report, they pointed out that, since no family in the numerous cases they were dealing with kept a record of the amounts expended by each family member, the Masters had been compelled to estimate the portion of the decedent's total earnings which benefited each one. It is, of course, this precise situation that existed here with the result that the Trial Court found it necessary to make just such an estimate.

Interestingly enough, despite the protestations made by the appellant as to the "detailed evidence" supposedly submitted to the Trial Court on the subject of the proper consumption factor to be applied here, the claimant herself has nowhere undertaken to state any specific figure that that "detailed evidence" supposedly supports as constituting the total of consumption properly to be deducted in this case. Instead, the appellant has repetitively made the statement that all that needs to be determined is the limited amount directly attributable to personal consumption by the decedent, without any regard being paid to the consumption shared by the decedent and his spouse, and that only that amount of personal consumption need be deducted from the amount available. See pp. 18, 24 and 29 of the appellant's brief. This is, in essence, the same argument that was made by the appellant's attorneys on behalf of the claimant in the Fanning case below

both in briefs before the decision was rendered and then in a brief in support of a motion to increase the award, which latter motion led Judge Cannella to make his pungent comments on the nature of the proof presented and on the absence, in his judgment, of any fair basis on which to determine the consumption factor except by the application of the"Weinfeld formula".

Claimant ignores, here, as she did in the court below, that, in determining loss of pecuniary contribution, it is required, as a matter of law that, after deriving the net amount available for family household expense by deducting the decedent's personal expenses and income taxes where appropriate, a further deduction be made for that portion of the family household expenses fairly attributable to the decedent. It is the amount remaining after this deduction which is, properly speaking, the measure of claimant's loss of pecuniary contribution. O'Connor v. United States, 251 F. 2d 939, 943 (2d Cir. 1958) and 269 F. 2d 578 (2d Cir.1959) on second appeal after retrial; Petition of Moore-McCormack Lines, 184 F. Supp. 585, 593-594 (S.D.N.Y. 1960); Petition of Marina Mercante Nicaraguense, S.A., 248 F. Supp. 15, 26-27 (S.D.N.Y. 1965) modified on other grounds 364 F. 2d 118 (2d Cir. 1966) cert. den. 385 U.S. 1005 (1967); Nye v. A/S D/S Svendborg 358 F. Supp. 145, 153 (S.D.N.Y. 1973) aff'd in part and rev'd in part on other grounds 501 F. 2d 376 (2d Cir. 1974).

The Weinfeld formula, which is not a rule of law and was not applied by the court below as a rule of law, is merely a method, recognized by the courts as just and equitable, of determining the decedent's share of household expense, so as to determine the amount remaining for the beneficiary, especially in the absence of extraordinary facts showing that a different apportionment should be made. Cf. Nye v. A/S D/S Svendborg, supra. It was specifically recognized as such by the court below in its opinion (J.A. 250a) although Claimant, in misquoting that portion of the Trial Court's opinion on p. 18 of her brief, misses the significance of that point also.

Claimant here has not demonstrated that the use of the Weinfeld formula by the court below in her case was clearly erroneous. On the contrary, taking account of the facts presented and particularly the expanding vacation benefits and increasing periods of time decedent would have been off the vessel prior to retirement and at home with increased family household expense attributable to him, it is submitted that the court below was quite correct in applying the Weinfeld formula to the facts of this case.

The Deduction of the Differential between the Higher Amount of the Death Benefit payable prior to Retirement and the Lower Amount payable after Retirement

At the outset, it is worthy of note that not one word of objection was raised in the briefs for the Claimant below when the Petitioners' briefs below pointed out the appropriateness of making this deduction.

In addition to that, it is to be noted that, even now, the Claimant's brief does not discuss the decision of this Court that was cited in the Petitioners' briefs below, namely, Cunningham v. Rederiet Vindeggen, A/S & M/S TROLLEGEN, 333 F. 2d 308, 316-17 (2d Cir. 1964) where the Court stated that, but for the fact that the State law was applicable, the credit would have been allowed. As indicated in that decision, the basis for the allowance of such a credit is that the intent of the Masters, Mates and Pilots' Pension and Welfare Plans in our case was to provide one of two things, (a) a death benefit in the full amount without a pension or (b) a death benefit in a reduced amount, plus the pension. (J.A. 216a). The differential in the case of this particular decedent, as a deck officer, was $9,000.00, and that was the deduction that was taken into account. The Claimant's brief has not recognized that distinction made by this Court but has rather gone off on the tack of claiming that what is involved here is a credit on the basis of funds from a "collateral source". Nothing could be further from the case since

the decision that had to be made by the Trial Court was what the Claimant's loss of benefits was. In awarding the Claimant full pension benefits, the Trial Court could hardly disregard the fact that that, in effect, meant that her death benefit loss under the Plans was only $1,000.00, (J.A. 216a) the death benefit following retirement, rather than the $10,000.00 she concededly received so that the differential had to be taken into account as was done.

Instead of discussing the Cunningham case which, as we have noted, was cited by Petitioners in the lower court, the Claimant has contented herself with a long quotation from Blake v. Delaware and Hudson Railway Company, 484 F. 2d 204 (2nd Cir. 1973), which is briefly discussed and much quoted from at pp. 31-34 of the Claimant's brief. However, a reading of that case shows its inappositeness. The panel of three Judges who decided that case did not agree that it involved a question of "collateral source" that in any way applies to our situation. The District Judge sitting by designation, who wrote the opinion, essentially wrote for himself. While Chief Judge Friendly concurred, he did so within the limits indicated by his concurring opinion in which he first indicated his reaction that the inability of the railroad to obtain a credit constituted a shocking injustice and then went on to explain his concurrence as being constrained by the pertinent statute in the case which

specifically limited any recovery by the railroad to premiums paid by it for the recovery of which the railroad had not sued. Judge Lumbard wrote an outright dissenting opinion, echoing Judge Friendly's view of the shocking injustice involved by the result reached in the opinion and going on to disassociate himself entirely from the result reached in the opinion. The statutory limitation to the recovery of premiums, the point on which Judge Friendly's decision to concur turned, does not exist in our case, and the pertinent authority is not the Blake case cited by the appellant but rather the Cunningham case cited by the Petitioners, which the Claimant has failed to discuss even though, as noted, that case was cited in the Court below on the damage issue by the Petitioners.

The Claimant's argument about "collateral source" might be well taken if the calculations made by the Trial Court had deducted the amount of the"post-retirement" death benefit of $1,000.00 received by the Claimant. Concededly, no such deduction was made. The deduction made was for $9,000.00, out of the $10,000.00 received by Claimant, that would only have been received by her under the provisions of the Plans if her decedent had died before retiring. The projections made by the Trial Court were based on the contrary assumption, namely, that her decedent, except for the sinking, would have gone

on working until this year and would then have retired, with additional years of benefits being calculated and allowed by the Trial Court during the period of retirement. In the projections made by the Trial Court in favor of the Claimant on the basis of the assumptions indicated above, the loss figure calculated by the Court necessarily had to allow a credit for the $9,000.00 differential that represented monies that the Claimant would not have received if, in fact, as the Trial Court assumed, her decedent's death would not have occurred until after retirement. If the Claimant wishes to press the argument that she is entitled to the entire $10,000.00 amount without any deduction, the necessary implication of that argument would be that her decedent's death would actually have taken place before his retirement, and the result of that argument should be that she ought to be deprived then of the amount of $60,572.00 awarded to her by the Trial Court for the post-retirement period during which the Trial Court assumed that her decedent was alive. This would have the effect of reducing the amount awarded to her from $204,748.00 to $144,176.00, a result that would be palatable to the Petitioners but hardly to the Claimant.

Alternatively, the Claimant's argument about "collateral source" might properly be made if Petitioners were attempting to get the benefit of retirement payments

under the Pension Plan on the limited theory that they contributed to the Pension Fund. That approach could conceivably run afoul of Haughton v. Blackships, Inc., 462 F. 2d 788, 790 (5th Cir. 1972) and Hartnett v. Reiss Steamship Company, 421 F. 2d 1011, 1016 (2d. Cir. 1970), cited and discussed to some extent in the lengthy quotation from the Blake case mentioned above. However, the Petitioners here are not claiming a credit on any such basis and are not claiming a credit, in any event, for retirement payments.

What is involved here is a necessary choice, in ascertaining the monetary loss of the claimant, between (a) assuming that the decedent would in any event have died before retiring, which would have the result of giving the claimant the entire $10,000.00 death benefit but in addition only a limited calculation of her loss with respect to lost earnings that would have to be considered to have terminated at a date prior to that on which the decedent might have gone into retirement, and (b) the alternative adopted by the Trial Court, based on the assumption that the decedent would have continued to work for more than ten years after 1963 and would have retired and lived on for thirteen or fourteen more years, giving the Claimant the benefit of the earnings for that entire period but without a duplication in the form of the $9,000.00 out of the $10,000.00 death benefit she received that she would

not have received in that situation. This is simply a matter of the proper method of calculating the claimant's monetary loss for which she is entitled to be compensated by the Petitioners and is not a situation in which the doctrine of "collateral source" is applicable.

In sum, the Claimant appears to have put forward a mistaken argument that has not taken account of what amounted to alternative death benefits under the Plans, with one having to do with death prior to retirement and the other having to do with death after retirement. The correct calculation of her monetary "loss" necessarily had to take account of the fact that the first alternative under the Plans, providing for payment of the full amount of $10,000.00 as a death benefit but without any retirement benefits, is not in accord with the facts assumed by the Trial Court in favor of the Claimant which took account rather of the second alternative under the Plans, calling for the payment of retirement benefits but providing for a death benefit of $1,000.00 as contrasted with the $10,000.00 provision under the first alternative. The Claimant's argument is simply incorrect. Cunningham v Rederiet Vindeggen, A/S & M/S TROLLEGEN, 333 F. 2d. 308, 316-17, supra.

Deduction of Income Taxes

As conceded by the Claimant (Br. p. 25), the Trial Court only deducted income taxes in those years in which the level of the Court's projected income for the decedent ranged from $28,044.00 to $34,933.00. Those levels are clearly above the upper reaches of the middle income scale, and an appropriate deduction for the impact of taxes on the amounts that might have been available if the decedent had lived is not only permissible but ought to be made. Leroy v. Sabena Belgian World Airlines, 344 F. 2d 266, 276 (2d Cir. 1965), cert. den. 382 U.S. 878 (1965), allowing the deduction of income taxes with respect to anticipated annual earnings of $16,000.00 to $25,000.00; McWeeney v. New York N.H. & H.R.R. Co., 282 F. 2d 34 (2d Cir. 1960), cert. den. 364 U.S. 870 (1960); Cox v. Northwest Airlines, Inc., 379 F. 2d 893 (7th Cir. 1967), cert. den. 389 U.S. 1044 (1968), permitting the deduction of income taxes in the case of anticipated annual earnings of $15,000.00 to $20,000.00. In Rogow v. United States, 173 F. Supp. 547 (S.D.N.Y. 1959), a decision rendered by then District Judge Kaufman, which is cited by the Claimant in the footnote to p. 19 of her brief, for another point to be sure, Judge Kaufman deducted income taxes of approximately $10,000.00 from the decedent's annual income of $23,623.00. Accordingly, it would appear that it was

not clearly erroneous for the Trial Court to make the finding it did.

The Claimant has relied rather strongly on the McWeeney case, discussing it at pages 35-38 in her brief, but she has not recognized that the Court in that case expressly recognized the appropriateness of taking income taxes into account at higher levels of earnings than were before the Court in that case in which the injured plaintiff's indicated annual rate of income was a meager $4,800.00.

In an attempt to distinguish the decision in the Leroy case, supra, the Claimant maintains that the touchstone in that case must have been the total of earnings of $600,000.00 projected for the 37 year period of work expectancy of the decedent in that case, earning $16,216.00 per year. That would hardly constitute a basis for distinguishing that case from our case where the decedent was found by the Trial Court to have projected earnings over a 13 year work expectancy of $315,956.00 ($24,300.00 per year) and pension benefits for an additional 13 year period coming to $183,430.00, with the total of the decedent's gross income for the entire 26 year period of work expectancy and retirement coming to a total figure of $499,386.00 (or $19,000.00 per year).

Donald E. Klein, Esq., whose name appears on the brief for the appellant, represented claimants below whose decedents were engineer officers and he filed the very first brief submitted to the Trial Court on the question of damages. In it he made deductions for income taxes on his own initiative at and above the level of $25,000.00.

As we have noted, the Trial Court only deducted taxes where the earnings of this claimant's decedent were assumed to be in the range of $28,044.00 to $34,933.00. That finding was not clearly erroneous.

Medical Benefits

On this particular subject, the Trial Court used clear and unmistakable language, at page 8 of the opinion (J.A. 253a), in pointing out that the evidence offered by the Claimant of the sums ~~of~~ the employer would have paid into the Medical-Welfare Plan if the decedent had lived is not the true measure of loss, citing Sweeney v. American Steamship Co., 491 F. 2d 1085 (6th Cir. 1974), and going on to say that "Absent any proof of the loss suffered by the beneficiaries, an award for these benefits would be purely speculative."

The Claimant urges here that some proof put forward by her with respect to her payment of $60.00 a year,

matched by a like a[illegible] paid by her employer, and her payment of additional insurance premiums of $204.00 a year was proof of the "* * * value of these fringe benefits which would enure to the benefit of decedent's family had he lived, * * *" within the language in Sweeney v. American Steamship Co., 491 F. 2d 1085 at 1090. However, the Claimant has misconceived what the Court was talking about in Sweeney and what the Trial Court was talking about with respect to there being an absence of "* * * proof of the loss suffered* * *". There was no evidence whatever with respect to any benefits that the Claimant could have had under the Medical-Welfare Plan that she did not have in the period over ten years since the date of the sinking of the MARINE SULPHUR QUEEN. The record is clear that, in the period of more than ten years from Mr. Watson's death to the date of trial, she was not injured or hospitalized and was only sick once, for five days with influenza (J.A. 53a, 54a).

The blithe reference to insurance premiums recently paid by the appellant, as though they somehow constituted a measure of damages for the items of lost medical benefits, is deficient for several reasons.

For the record is clear that, even during the decedent's life, hospitalization insurance premiums were paid by the decedent and his wife in the years 1961 and 1962, at least, as reflected in the income tax returns for those years showing an item of expenditure in each year of $60.18 as insurance premiums apparently paid to Bankers Life & Casualty

for hospitalization insurance (J.A. 70a, 74a). Those insurance premiums were obviously unrelated to any coverage supposedly available because of the existence of the Union's Medical-Welfare Plans so that it appears that attempted references at this point to insurance premiums paid by the appellant are not helpful in proving damages.

In addition, there was no proof submitted by the Claimant to show that any coverage carried by her was for benefits comparable to those provided for by the Medical-Welfare Plan. Indeed, the $204.00 insurance premium figure used by the Claimant for a policy with Prudential Life Insurance Company (Br., p. 43) appears to relate to life insurance rather than health insurance (J.S. 71a, 75a). Such insurance would seem to have been carried before the decedent's death and to have paid dividends (J.A. 160a, Answer to Interrogatory 16h). All in all, there was simply a failure of proof on this item.

Inflation

The Claimant urges that, with respect to the retirement years projected for the decedent, the Trial Court should have added an annual 4-1/2% increment for projected inflation.

The Trial Court did take account of increases in wages as proved down to the date of the trial and used a factor of an increase of 4.6% in base pay for the period beyond

the date of the trial up to the time of the decedent's retirement. However, in view of the speculative nature of the proof offered by the Claimant with respect to the post- retirement period, which is adequately indicated by a reading of pages 44-46 of her brief, the Trial Court quite properly declined to speculate on developments into the future after the date fixed by the Trial Court as the date of the decedent's retirement.

As pointed out by the Court in Hoffman v. Sterling Drug, Inc., 485 F. 2d 132 (3rd Cir. 1973), there is an almost universal rejection of the use of inflationary considerations as a factor in computing future losses.

On the basis of the record below, the Trial Court was on solid ground in declining to adopt the approach urged by the Claimant.

II

THE FINDINGS OF THE TRIAL COURT COMPLAINED OF BY PETITIONERS WERE CLEARLY ERRONEOUS

Petitioners' cross-appeal relates to the allowance by the Trial Court of (i) prejudgment interest, (ii) at a rate of 6%, (iii) for the entire period from February, 1963 to the July 31, 1974 date of decision, (iv) on the basis of compound interest factors, and (v) the use by the Trial Court of a

6% annual increase factor in calculating future earnings. These points will be discussed below in that order.

The Allowance of Prejudgment Interest

There is authority for the proposition that, as a matter of law, no prejudgment interest is allowable in death cases. Petition of United States Steel Corporation, 436 F. 2d 1256, 1277 (6th Cir. 1970).

In addition, the appellant here chose not to pursue the matter of her damages exclusively in the limitation proceeding initiated in admiralty by the shipowner but rather chose to proceed in the suit instituted by her on the civil side of the Court (J.A. 7a-9a). In such a civil suit, prejudgment interest is not allowable. The authorities are in agreement that, in the case of a Jones Act suit at law, prejudgment interest is not to be awarded. Cortes v. Baltimore Insular Lines, 66 F. 2d 526 (2nd Cir. 1933); Casey v. American Export Lines, 173 F. 2d 324 (2nd Cir. 1949), cert. den. 338 U.S. 885 (1949), reversed on other grounds on rehearing, 176 F. 2d 337 (2d Cir. 1949); Sanford Bros. Boats, Inc. v. Vidrine, 412 F. 2d 958, 972-3 (5th Cir. 1969)and Cleveland Tankers v. Tierney, 169 F. 2d 622 (6th Cir. 1948).

With particular reference to the procedure followed by this Claimant, we have here the reverse of the situation that was involved in Doucet v. Wheless Drilling Company, 467 F. 2d 336, 340-1 (5th Cir. 1972), where the Court felt that the withdrawal of a demand for a jury, in what had started out as a Jones Act suit at law, was a sufficient election to proceed in admiralty. Here, the claimant's insistence was in the other direction, wanting to step out of the admiralty proceeding and into the Jones Act suit at law originally instituted by her but stayed because of the institution of the limitation proceeding. Thus, while this Court does not appear to have passed on the precise question decided by the 6th Circuit in Petition of the United States Steel Corporation, supra, it would seem that it can fairly be said that this Claimant should not have been awarded prejudgment interest because of her election to proceed on the civil side rather than in admiralty where prejudgment interest might have been allowed.

However, even if it be thought that the claimant has some justification for claiming that she is entitled here to rely on admiralty doctrine, the award made by the Trial Court of interest (a) at the rate of 6% and (b) for the entire period from the date of her decedent's death in February, 1963 to the July 31, 1974 date of the decision on damages was improper in both respects.

Interest Rate

The evidence in the case shows that investments during that period of time were not throwing off a return of as much as 6% in the way of interest or dividends. See J.A. 30a. Beyond that, the rate of interest used, namely 6%, exceeds the rates that have heretofore been found reasonable. See e.g. Nye v. A/S D/S Svendborg, 358 F. Supp. 145, aff'd in part and rev'd in part on other grounds, 501 F. 2d 376 (2nd Cir. 1974), using 5%; Petition of Marina Mercante Nicaraguense, S. A., 364 F. 2d 118, 125-126 (2nd Cir. 1966), cert. den. 385 U.S. 1005 (1967), using 4%; and Moore-McCormack Lines, Inc. v. Richardson, 295 F. 2d 583, 595 (2nd Cir. 1961), cert. den. 368 U.S. 989 (1962), using 4%.

Period for Which Interest Was Allowed

Apart from the unduly high rate of interest used in the calculation of prejudgment interest, the Trial Court also erred in allowing prejudgment interest for the entire period from the date of the decedent's death down to the date of the rendition of judgment. Reference to the docket sheet will show that the Petitioners did not delay the proceedings in this case but rather that this appellant, along with other claimants, created a delay that lasted for years because of the extensive pretrial discovery in which they wished to engage and did engage even though the Petitioners did not conduct any examainations before trial and did not in any way

contribute to the delay in the reaching of the trial of the issue of liability. The trial of the liability issue was finally commenced, after further and continuing discovery activity on the part of the appellant and the other claimants, on June 3, 1969. The decision adverse to the shipowner on the question of liability to the Claimant was rendered in May of 1970 (In re MARINE SULPHUR QUEEN, 312 F. Supp. 1081), and it was affirmed by this Court in 1972 (In re MARINE SULPHUR QUEEN, 460 F. 2d 89 (2nd Cir. 1972), cert. den., 409 U.S. 782 (1972)). In a somewhat similar situation presented in Venore Transportation Company v. Oswego Shipping Corporation, 363 F. Supp. 1366 (S.D.N.Y., 1973), aff'd 498 F. 2d 469(2d Cir. 1974), Judge Weinfeld pointed out that the casualty to the vessel in that case occurred on May 10, 1964, almost ten years before Judge Weinfeld's decision was rendered, that suit was not started until March of 1969 and that the taking of the Master's deposition was dragged out and not completed until September 10, 1970. On the basis of the pertinent statistics from the 1967 Dir.Admin.Off. U.S.Cts., Ann. Rep. 128-29, showing that the case could have been prepared and tried within three years after the casualty, Judge Weinfeld limited the period for prejudgment interest to the three years preceding the date of the entry of the judgment. In the instant case, in similar circumstances, it would appear that prejudgment interest ought to have been limited to a period of no more than three years preceding the ruling on liability handed

down by the Trial Court in May of 1970 and, accordingly, that prejudgment interest should not have been allowed from 1963 to 1967 or at a rate higher than 5%. The shipowner should not be penalized since he did not delay the progress of the case to trial. Accord: Petition of Risdal & Anderson, Inc., 291 F. Supp. 353, 358 (D. Mass. 1968).

Erroneous Use of Compound Interest rather than Simple Interest in Calculating Prejudgment Interest

The rule of law applicable to all cases, including admiralty cases, is that, absent a statute or breach of fiduciary relationship, simple interest rather than compound interest is to be used in the calculation of prejudgment interest on damages. McCormick on Damages, §53; 47 C.J.S., Interest §§1, 21b, 63 and 65; 32 N.Y. Jur. Interest and Usury §§ 2, 9 and 21; Shelley v. Cody 187 N.Y. 166 (1907) and In re Realty Associates Securities Corp., 66 F. Supp. 416, 421 (E.D. N.Y.1946), mod. on other grounds 163 F. 2d 387 (2nd Cir. 1947), cert. den. 337 U.S. 836 (1947), compound interest denied as against public policy.

The Application of a 6% Annual Increase Factor in the Calculation of Future Earnings Was Unduly Speculative

This precise point does not appear to have been before this Court, but it was considered by the Third Circuit in Hoffman v. Sterling Drug Company, Inc., 485 F. 2d 132 (3rd Cir. 1973). There, the argument presented to the Court

had to do with spectacular wage jumps in the 1960's which the Court described as one of the more inflationary periods in our nation's history. The decedent in that case was an architectural draftsman who had a 26 year work expectancy. The Third Circuit struck down, as unwarranted speculation, a projected earnings increase of 6% per year. In the instant case, it would seem that the same result should follow especially having in mind the shrinking shipping industry and loss of sailing opportunities for deck officers such as the late Mr. Watson (See pp. 2, 4, supra).

CONCLUSION

The decision below should be affirmed, so far as the main appeal is concerned, but should be reversed with respect to the errors listed above by the cross-appellants.

Dated New York, N. Y.
April 3, 1975

Respectfully submitted,

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Service of two (2) copies is hereby admitted this 2nd
Day of April, 1975 3:20 p.m.

Marian Schwartzberg

Ellen Lefebvre